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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73 - No. 6739

STEVEN COSTARELLI,

Appellant

v.

MASSACHUSETTS,

Appellee

ON APPEAL FROM THE MUNICIPAL COURT
OF THE CITY OF BOSTON

BRIEF FOR THE APPELLANT

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ON APPEAL FROM THE MUNICIPAL COURT
OF THE CITY OF BOSTON

BRIEF FOR THE APPELLANT

OPINION BELOW

No opinion, findings of facts, or conclusions of law were reported by the Municipal Court of the City of Boston.

JURISDICTION

On February 27, 1974, Steven Costarelli was charged in the Municipal Court of the City of Boston with using a motor vehicle without authority and knowing such use to be unauthorized, an offense set out in G.L. Ch. 90 Sec. 24(2)(a), and carrying a maximum possible sentence of a $500 fine and two years imprisonment. At the beginning of the proceeding, Steven Costarelli duly moved the trial court in writing for a trial by jury in the first instance, asserting specifically his constitutional rights to same under the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States. The trial court denied this motion.

Thereupon, Steven Costarelli was found guilty by the trial judge and sentenced to one year imprisonment. From the judgment of the Municipal Court, Steven Costarelli "appealed" to the Superior Court for a trial de novo and concurrently brought this appeal to this Court. This Court postponed the issue of jurisdiction for further consideration.

Jurisdiction over this appeal is predicated on 28 U.S.C.1257(2) which grants review of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, . . ." The jurisdictional question at hand, then, is whether the sentence imposed by the Municipal Court for the City of Boston is a final judgment of a highest state court.

In Massachusetts there is no procedure for obtaining *direct* appellate review of a conviction in a municipal or district court.[1] A defendent has a right of "appeal" for

[1]The municipal and district courts of Massachusetts comprise the first tier of Massachusetts' two-tier structure. For purposes of this appeal, they are equivalent courts.

a trial de novo by jury in the superior court, the second tier in Massachusetts' two-tier criminal procedure. However, a trial de novo in the superior court is a new trial and not a remedy for reviewing the proceedings in the lower court.

Alternatively, if a defendant does not "appeal" his conviction to the superior court, he may obtain collateral review of any jail sentence imposed by way of a petition for writ of habeas corpus.[2] This remedy is a collateral remedy and not a method of review prerequisite to this Court's jurisdiction under 28 U.S.C. 1257(2):

> The possibility that the appellant might obtain release by a subsequent and distinct proceeding, and one not in the nature of a review of the pending charge, in the same or a different court of the State does not affect the finality of the existing judgment or the fact that this judgment was obtained in the highest state court available to appellant. *Largent v. Texas,* 318 U.S. 418, 421-22 (1943).

Although the Commonwealth has not raised them and rightly so, there are two other indirect remedies for attacking criminal onvictions in Massachusetts. The first is the writ of error.[3] Like the writ of habeas corpus, this is a collateral remedy, and not a means of *direct* review:

> The writ of error does not bring into the Supreme Judicial Court the original case. That remains in the court in which it went to judgment. *Lee v. Fowler,* 263 Mass. 440, 443 (1922).

[2]G.L. Ch. 248 Secs. 1-40.

[3]G.L. Ch. 250 Secs. 1-2, 9-12.

> A writ of error is an original, independent action and in its origin and nature is distinguishable from appeals and bills of exceptions, which are continuations of the original action. *Commonwealth v. Marsino,* 252 Mass. 224, 227-228 (1925)

Quite apart from its collateral nature, the remedy does not lie to attack a criminal conviction in a district or municipal court:

> In Massachusetts, the legislation permits a de novo Superior Court trial for the defendant in all aspects of the case but it does not provide a method of reviewing error of law committed in the course of the trial in the District Courts. See G.L.C. 250 Sec. 9. It is reasonable to conclude that the legislature intended that, upon appeal, the question of guilt, the sentencing power and all related matters be transferred to the Superior Court for determination completely divorced from the record of the prior trial. . . . We need not speculate whether convictions in the District Court resulted from error. . . . *Mann v. Commonwealth,* __Mass.__, 271 N.E.2d 331, 333 (1971).

The second remedy referred to above is a petition to the ~~Superior~~ Supreme Judicial Court pursuant to G.L. Ch. 211 Sec. 3 as amended by Ch. 1114, Sec. 44, of the Acts of 1973 which reads in relevant part:

> The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

This remedy is distinct and collateral in nature. It is instituted by a summons and complaint as an original action, and is governed by the *Massachusetts Rules of Civil Procedure.*[4] Additionally, the Supreme Judicial Court has recently held that it does not have jurisdiction under the statute to review a judgment of a district or municipal court. More specifically, in *Whitmarsh v. Commonwealth,* __Mass.__, 316 N.E.2d 610, 612-613 (1974), the plaintiff Whitmarsh brought a petition pursuant to G.L. 211 Sec. 3 to challenge his conviction in a district court on the grounds that he was denied a jury trial in the first instance. In ruling on the jurisdictional issue, the Supreme Judicial Court held:

> The first paragraph of the plaintiff's petition states that the *jurisdiction* (emphasis supplied) of this court is invoked pursuant to M.G.L. Ch. 211 Sec. 3 which provides in part that this court "shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein *if no other remedy is expressly provided.*" (emphasis by the Court)
>
> . . . . .
>
> (a) This is not a case where "no other remedy is expressly provided."
>
> . . . . .
>
> *Conclusion* On the basis of our discussion above we conclude as follows: . . . (b) that it [the petition] cannot be maintained as a petition for the exercise of this court's extraordinary powers under M.G.L. Ch. 211 Sec. 3, ...

In light of the above, appellant submits that the judgment of the Municipal Court of the City of Boston

[4] This remedy is similar to the all writs statute, 28 U.S.C. 1651.

was not subject to any further *direct* appellate review, either discretionary or by right. Accordingly, that judgment is a "judgment . . . rendered by the highest court of a State in which a decision could be had . . ." within meaning of Sec. 1257(2). Indeed the Commonwealth concedes this point on p. 4 of its motion to dismiss: "In the instance case, while the judgment is not subject to further review . . ."

Lastly, on the issue of this Court's jurisdiction, the Commonwealth argues that the judgment of the Municipal Court of Boston is not a "final" judgment within the meaning of Sec. 1257. Its argument is two-fold. First, it maintains that since the appellant exercised his right for a trial de novo in the superior court "the litigation in the Municipal Court can only be considered as an intermediate step in determining the appellant's guilt or innocence," and "[t]herefore, the decision in the Municipal Court . . . cannot be considered a 'final judgment' . . ."[5] The short answer to this argument is that the judgment of the Municipal Court is "final" because there were no further steps left open to be taken in the proceedings in the Municipal Court. The sentence of one year imprisonment was the "final word"[6] of the Municipal Court of Boston.

The second contention by the Commonwealth is that appellant's "appeal" for a trial de novo in the superior court "eradicated" the judgment of the Municipal Court, and hence, "the finding and sentence of the Municipal Court have no force and effect for any

[5]See p. 4 of the Commonwealth's Motion to Dismiss.

[6]*Market Street Railway Co. v. Railroad Commission of California,* 324 U.S. 548, 551 (1945).

purpose upon a judge of the Massachusetts Superior Court, much less of the United States Supreme Court, for purposes of an appeal based upon 28 U.S.C. Sec. 1257." The thrust here is that the judgment of the Municipal Court became mooted by appellant's "appeal" for a trial de novo.[7] The answer to this proposition is that the judgment is not moot under the state procedure, let alone from a federal viewpoint, *Sibron v. New York,* 392 U.S. 40, 50-58 (1968). For instance, the statute under which Steven Costarelli was convicted required the Registrar of Motor Vehicles of Massachusetts to revoke his driver's license for a minimum period of one year or until such time as his conviction was reversed on "appeal".[8] This action was restrained by district court judge Joseph Tauro and a three judge court has been convened to determine the constitutionality of this procedure, *Costarelli v. Lucey, Registrar of Motor Vehicles*, No. 941T, (D. Mass. 1974). Similarly, G.L. Ch. 278 Sec. 24 makes clear that the sentence imposed by the Municipal Court is quite viable:

> If the appellant fails to enter and prosecute his appeal [in the superior court] he shall be defaulted on his recognizance and the Superior Court may impose sentence upon him for the crime of which he was convicted [in the district or municipal court], as if he had been convicted in said court, and if he is not then in custody, may

[7]In the circumstances of this case it would be more accurate to characterize Steven Costarelli's "appeal" for a trial de novo as a protective appeal.

[8]G.L. Ch. 90 Sec. 24(2)(b), 2(c) (Br. App. 5a).

issue process to bring him into court to receive sentence.

Accordingly, it is submitted that the judgment of the Municipal Court of Boston is not moot and is a "final judgment . . . rendered by the highest court of a State in which a decision could be had" within the meaning of these words in 28 U.S.C. 1257(2).[9]

QUESTIONS PRESENTED

1. Is Massachusetts bound by the rule of *Callan v. Wilson,* 127 U.S. 540, guaranteeing a defendant a trial by jury in the first instance when charged with an offense carrying a possible maximum jail sentence in excess of six months?

2. Where a defendant is entitled to a trial by jury, does the interposition of a trial by magistrate before a trial by jury impose an unconstitutional burden on the defendant's Sixth Amendment right to a speedy trial?

3. Where the Sixth Amendment guarantees a trial by jury, do state de novo procedures which deny this right in the first instance violate the double jeopardy provisions of the Fifth Amendment?

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[9]Subsection (2) of Section 1257 is applicable since the Municipal Court sustained the constitutionality of the state statutes in question by denying defendant's motion for a jury trial. In the motion (App. -4), the defendant specifically asserted his constitutional rights and the pertinent decisions of this Court which he alleged to establish his rights.

STATUTES INVOLVED

Article XII of the Declaration of Rights of the Massachusetts Constitution, Massachusetts General Laws (ter. ed.) Ch. 263 Secs. 4 & 6, Ch. 218 Sec. 26, Ch. 278 Secs. 2, 18, 20 and 24, comprise the framework of Massachusetts' two-tier trial de novo criminal procedure and are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

On February 27, 1974, Steven Costarelli was charged in the Municipal Court for the City of Boston with using a motor vehicle without authority and knowing such use to be unauthorized, an offense set out in M.G.L. Ch. 90 Sec. 24(2)(a) carrying a maximum possible sentence of a $500 fine and two years imprisonment. At the beginning of the proceeding, Steven Costarelli duly moved the trial court in writing for a trial by jury in the first instance, asserting specifically his constitutional rights to one under the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States. The trial court denied this motion, Thereupon, the government placed its case in evidence and rested. Steven Costarelli did not testify or otherwise offer any evidence. The trial judge then found Steven Costarelli guilty and sentenced him to one year imprisonment. Appellant brings this appeal to reverse the conviction of the Municipal Court of Boston.

SUMMARY OF THE ARGUMENT

Massachusetts maintains a two-tier trial de novo criminal procedure. For most offenses the accused is brought to trial initially in the first tier, the district or municipal courts, where he is tried before a judge. He cannot obtain a trial by jury, but if he is dissatisfied with the judgment of the lower court, he may "appeal" to the second tier, the superior court, and obtain a trial de novo by jury. If the defendant is reconvicted in the superior court, he can obtain traditional appellate review of this conviction in the Massachusetts Appeals Court or Supreme Judicial Court.

In *Callan v. Wilson,* 127 U.S. 540, 557 (1888), this Court unanimously held that the right to trial by jury secured to the accused "the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged." Eighty years later, in *Duncan v. Louisiana,* 391 U.S. 145, 149, 158 n. 30 (1968), this Court held that the Fourteenth Amendment guaranteed "a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee," and hence, by implication it bound Massachusetts to the rule of *Callan v. Wilson,* subject to the qualification in Justice White's n. 30 that the Court's decisions interpreting the Sixth Amendment were "always subject to reconsideration."

Appellant maintains that the essence of the rule of *Callan v. Wilson* is that the accused should not be put "to the burden of two trials if he wishes a jury verdict" and that the interposition of a trial by magistrate is an unconstitutional imposition on the exercise of the right

to trial by jury. The "burden" on the right to trial by jury includes the additional expense the accused must bear for a meaningless trial in the lower court, the embarrassment of being found guilty and "appealing", an additional bail bond premium, and the threat of an increased penalty upon reconviction in the second tier.

The burden of a district court trial cannot be circumnavigated. If the defendant remains silent and is convicted, collateral consequences, e.g. loss of one's driver's license, attach immediately and the unimpeached testimony of the government witnesses may be introduced against him in his trial de novo in the superior court should the witnesses become unavailable. Additionally, if the accused fails to "prosecute his appeal, he shall be defaulted on recognizance and the superior court may impose sentence upon him for the crime of which he was convicted." G.L. Ch. 278 Sec. 24.

In addition to being a burden on the right to trial by jury, the interposition of a trial by magistrate runs counter to the "purpose" of the right to trial by jury, namely, to protect the accused from government oppression, such as the unnecessary burdens set out above, and to interpose "between the accused and his accuser . . . the commonsense judgment of a group of laymen." From this it follows that the rule of *Callan v. Wilson* is an essential element of the right to trial by jury in contradistinction to the unanimity for 12 man requirements which are "features" of a jury. As such, the rule should be left undisturbed.

Additionally, appellant maintains that Massachusetts has no more right to interpose a trial without a jury than it would to interpose a trial in which the accused was denied the right to counsel, or the right to remain silent, or the right to confront

witnesses. And it is no answer on Massachusetts' part to say that it offers the defendant a trial de novo with the full panolpy of Sixth Amendment procedural rights. *Ward v. Village of Monroeville,* 409 U.S. 57 (1972). Similarly, Massachusetts has no compelling state interest to deny the accused a trial by jury in the first instance as it may accomplish its purpose of saving judicial resources by maintaining a two-tier structure, but allowing a defendant the choice of proceeding in the first tier initially or a jury trial in the first instance in the second tier. See e.g. *Holliday v. State,* 109 R.I. 93, (1971).

Quite apart from infringing the right to trial by jury, the interposition of a trial by magistrate is an unconstitutional imposition on the right to a speedy trial. More specifically, the two-tier procedure is totally counterproductive in minimizing the "anxiety and concern of the accused." For the defendant who chooses to remain silent and insist upon his right to a jury trial, a trial in the district court is a meaningless proceeding which may "drain his financial resources". The imposition of a sentence amplifies anxiety, and the ordinary inference drawn from "appeal" generates a "cloud of suspicion." In short, two-tier trial de novo cuts away the roots of the speedy trial guarantee.

Lastly, appellant maintains that the two-tier de novo procedure violates the double jeopardy provisions of the Fifth Amendment. The heart of the double jeopardy guarantee is that the government, absent a "manifest necessity", should be limited "to a single criminal proceeding to vindicate its vital interest in enforcement of its criminal laws." Implicit in limiting the government to one crack at the accused is limiting it to a

proceeding which comports with sixth amendment standards.

ARGUMENT

I

THE JUDICIAL STRUCTURE OF MASSACHUSETTS' TWO-TIER TRIAL DE NOVO PROCEDURE

The first tier of Massachusetts' two-tier de novo system is comprised of the district and municipal courts. These courts have jurisdiction[10] over all misdemeanors and crimes having a possible prison sentence of five years or less, and certain enumerated felonies having possible maximum prison sentences in excess of five years.[11] Criminal proceedings in the district or municipal courts are commenced by the issuance of a complaint. If the defendant pleads guilty to the complaint at arraignment, he is sentenced by the district or municipal court. If he is dissatisfied by the sentence, he may "appeal."[12] the issue of his sentence

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[10]This jurisdiction is concurrent with the superior court, the second tier of the de novo procedure, M.G.L. 218 Sec. 26, (Br. App. 3a). Criminal proceedings may be initiated by either a complaint before a district or municipal court, or upon an indictment by a grand jury in the superior court, M.G.L. Ch. 263 Sec. 4 (Br. App. 1a). However, prosecution of crimes over which the district and superior courts have concurrent jurisdiction is almost always commenced in the district or municipal courts.

[11]M.G.L. Ch. 218 Sec. 26 (Br. App. 3a). See generally, Smith, *Massachusetts Criminal Practice and Procedure,* Sec. 44.

[12]M.G.L. Ch. 278 Sec. 18 (Br. App. 3a).

to the superior court, the second tier in the de novo procedure, but he is not entitled to a de novo trial in the superior court on his innocence or guilt, *Commonwealth v. Crapo,* 212 Mass. 209, 210 (1912).

If the defendant pleads not guilty, he is tried in the district or municipal court before a judge. He cannot obtain a trial by jury. If he is convicted he has a right of "appeal"[13] to the superior court, the second tier of the de novo procedure, where he may obtain a de novo trial by a jury[14] of twelve[15] unless he waives this right in writing,[16] in which case he will be tried by a judge. If a defendant fails to "prosecute his "appeal", he *shall* be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court," M.G.L. Ch. 278 Sec. 24 (Br. App. 1a) (emphasis added).

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[13]M.G.L. Ch. 278 Sec. 18 (Br. App. 3a).

[14]M.G.L. Ch. 278 Sec. 2 (Br. App. 2a).

[15]From a guilty finding in certain district courts, a defendant alternatively may "appeal" for a de novo trial by jury of six in the district court, or from a guilty finding in the Municipal Court of Boston, he may "appeal" for a twelve man jury in the Municipal Court of Boston. These jury trials "proceed in accordance with the provisions of law applicable to trials by jury in the superior court" and appellate review from any conviction is "in the same manner provided for trials by jury in the superior court." G.L. Ch. 218 Sec. 27A; G.L. Ch. 278 Sec. 18A. The only practical difference to these alternatives is that the time for obtaining a de novo jury trial in the district or municipal court is much shorter than in the superior court.

[16]G.L. Ch. 263 Sec. 6, (Br. App. 2a).

If a defendant is found guilty in the superior court, he may obtain, by right, appellate review of his conviction in the Massachusetts Appeals Court or the Supreme Judicial Court.[17]

II

THE SIXTH AMENDMENT JURY TRIAL GUARANTEE MEANS TRIAL BY JURY IN THE FIRST INSTANCE

One hundred and seventeen years ago Chief Justice Shaw of the Massachusetts Supreme Judicial Court concluded that the right to trial by jury did not mean trial by jury in the first instance, but only that the state must afford the defendant a jury trial at some time. More specifically, Chief Justice Shaw sustained Massachusetts' two-tier trial de novo procedure in *Jones v. Robbins,* 8 Gray 329, 341 (1857)[18] by holding:

> And we believe it [the right to a trial by jury] has been generally understood and practiced here and in Maine, and perhaps in other States having a similar provision, that as the object of the clause is to secure a benefit to the accused, which he may avail himself or waive, at his own election; and as the purpose of the provision is to secure the right, without directing the mode in which it shall be enjoyed; it is not violated by an act of legislation, which authorizes a single magistrate to try and pass sentence, provided the act contains a

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[17]G.L. Ch. 278 Secs. 28, 31, 33A-33G.

[18]See also *Mann v. Commonwealth,* __Mass.__, 271 N.E.2d 331, 333 (1971)

> provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the common liability to give bail, or to be committed to jail, to insure his appearance and to abide the judgment to the court appealed to.

In reaching this result, Chief Justice Shaw was interpreting Article XII of the Declaration of Rights of the Massachusetts Constitution[19] guaranteeing that no law "shall subject any person to . . . infamous punishment . . . without trial by jury." However, the eminent Chief Justice noted that this clause was "equivalent" to the Sixth Amendment provision: " . . . in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . . "

Thirty one years later, in *Callan v. Wilson*, 127 U.S. 540 (1888), this Court reviewed the constitutionality of the District of Columbia's two-tier trial de novo procedure which was identical to the Massachusetts procedure.[20] In this case, Justice Harlan took note of *Jones v. Robbins* by citing at p. 553-4 the aforesaid quoted portion of Chief Justice Shaw's opinion, and then rejected its reasoning at p. 556-7:

> Except in the class or grade of offenses called petty offenses, . . . the guarantee of an impartial jury to the accused in a criminal prosecution, conducted either in the name, or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged. In such cases, a judgment of conviction, not based upon a verdict of guilty

[19]The full text of Article XII is set out in Br. App. 1a.

[20]*Callan v. Wilson*, 127, U.S. 540, 551.

> by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirement of the Constitution. When, therefore, the appellant was brought before the Supreme Court of the District, and the fact was disclosed that he had been adjudged guilty of the crime of conspiracy charged in the information in this case, without ever having been tried by a jury, he should have been restored to his liberty.

This decision, of course, was not binding upon Massachusetts. However, appellant submits that subsequent decisions of this Court have made the rule of *Callan v. Wilson*, applicable to the states.

III

DUNCAN V. LOUISIANA, 391 U.S. 145, (1968), BOUND THE STATES TO THE RULE OF CALLAN V. WILSON.

One hundred and eleven years after the decision of *Jones v. Robbins*, this Court in *Duncan v. Louisiana*, 391 U.S. 145, 149, (1968) made the Sixth Amendment applicable to the states:

> [W]e hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee;

and at page 157-158:

> Our conclusion is that in the American States, as in the federal judicial system, a general grant of jury trial for serious offences is a *fundamental right*, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants. (emphasis added)

The State of Louisiana had argued against this holding, on the grounds that "if due process is deemed to include the right to jury trial, States will be obligated to comply with all past interpretations of the Sixth Amendment" including the guarantee for a twelve-man jury, the unanimous verdict requirement, and the rule of *Callan v. Wilson*, 127 U.S. 540. *In rejecting this assertion*, Mr. Justice White observed at p. 158-159 n. 30:

> It is very unlikely to us that our decision today will require widespread changes in state criminal processes. First, our decisions interpreting the Sixth Amendment are always subject to reconsideration, a fact amply demonstrated by the instant decision. . . . Indeed, there appear to be only four States in which juries of fewer than twelve can be used without the defendant's consent for offenses carrying a maximum penalty of greater than one year. Only in Oregon and Louisiana can a less-than-unanimous jury convict for an offense with a maximum penalty greater than one year. However ten states authorize first-state trials without juries for crimes carrying lengthy penalties; these States give a convicted defendant the right to a *de novo* trial before a jury in a different court.

The breadth of the majority opinion is made clearer by Mr. Justice Fortas in his concurring opinion at p. 213: "But although I agree with the decision of the Court, I

cannot agree with the implication, see ante, at 158-159, n.30, that the tail must go with the hide: that when we hold, influenced by the Sixth Amendment, that 'due process' requires that the States accord the right of jury trial for all but petty offenses, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts." Likewise, Mr. Justice Harlan acknowledged the same in his dissent at p. 181:

> Consequently, the court has compromised on the ease of the incorporationist position, without its internal logic. It has simply assumed that the question before us is whether the Jury Trial Clause of the Sixth Amendment should be incorporated into the Fourteenth jot-for-jot and case-for-case, or ignored. Then the Court merely declares that the clause in question is 'in' rather than 'out'.

Duncan was followed by *Baldwin v. New York*, 399 U.S. 66 (1970) wherein five out of eight members of this Court "agreed that, at the very least, the Sixth Amendment requires a jury trial in all criminal prosecutions where the term of imprisonment authorized by statute exceeds six months."[21] Of the five members, three drew the demarcation line between "petty" and "serious" crimes at six months,[22] as is defined by common law[23] and in the federal system[24],

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[21] *Codispoti v. Pennsylvania*, ___U.S. ___, 41 LEd 2d 912, 919, n.4 (1974).

[22] Cf. *Callan v. Wilson*, 127 U.S. 540, 549, 556.

[23] Frankfurter & Corcoran, *Petty Federal Offenses and the Constitution Guarantee to Trial by Jury*, 39 Harv.L. Rev. 917, 934. (1926).

[24] 18 U.S.C. Sec. 1

and two held that the jury trial provisions of the Sixth Amendment were applicable to "all crimes".

Appellant submits that in light of *Duncan* and *Baldwin* he was entitled to a trial by jury in the municipal court as the maximum possible penalty under G.L. Ch. 90 Sec. 24(2)(a) was a $500 fine and two years imprisonment.[25] Alternatively, it should be observed that G.L. Ch. 90 Sec. 24(2)(b) & (c) requires the Registrar of Motor Vehicles to revoke the driver's license of a defendant who is convicted for using a motor vehicle without authority for a minimum period of one year or until his conviction is reversed upon "appeal" in the superior court. The loss of one's driver's license is a serious collateral consequence, *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930); *Parham v. Municipal Court*, ____ Iowa ____, 199 N.W.2d 50 (1972). Its revocation pursuant to G.L. Ch. 90 Sec. 24(2)(b) & (c) constitutes a criminal penalty since it is imposed for the commission of an act, i.e. using without authority, which is totally unrelated to the *operation* of a motor vehicle on the public ways or to the protection of the lives and safety of the public. As such this penalty was sufficient in itself to trigger the jury trial requirement under *Baldwin*:

> In extending the right to a jury trial, we define the category of "criminal" prosecutions as including any offense a direct penalty for which may be incarceration in a jail or penal institution. It also includes offenses which may result in the loss of a valuable license, such as a driver's license or a license to pursue a common calling, occupation, or business.* It must also include offenses which,

[25]Br. App. 5a.

> even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term.
>
> *This does not cover revocation of licenses pursuant to administrative proceedings where lawful criteria other than criminality are a proper concern in protecting public welfare and safety, as the basis of revocation or suspension in such instances is not that one has committed a criminal offense, but that the individual is not fit to be licensed, apart from considerations of only guilt or innocence of crime. *Baker v. City of Fairbanks*, Alaska , 471 P.2d 386, 401.[26]

In light of this contention, district judge Joseph Tauro has restrained the Registrar of Motor Vehicles from suspending Steven Costarelli's driver's license on account of his conviction in the Municipal Court of Boston by a magistrate, *Costarelli v. Lucey*, No. 941T, (D. Mass., 1974). Distinguishing *Almeida v. Lucey*, 372 F. Supp. 109, (D. Mass. 1974) affirmed ____ U.S. ____, (Oct. 15, 1974).

Subsequent to *Duncan* and *Baldwin*, state and lower federal courts have rendered conflicting opinions as to whether *Duncan* bound the states to the rule of *Callan v. Wilson*. The Supreme Court of Rhode Island answered

[26]See also *Keenan v. Board of Bar Examiners*, 317 F.Supp. 1350, 1360 (EDNC 1970) wherein Judge Craven notes that the loss of one's right to practice law is a penalty, Cf. *In re Winship*, 397 U.S. 358, 363-64, 367 (1970); *In re Gault*, 387 U.S. 1, 50; and *Frank v. United States*, 395 U.S. 147, 159-169 (19).

the question in the affirmative in *State v. Holliday*, 109 R.I. 93, 103, (1971):

> We hold, then that those charged with misdemeanors that could result, upon conviction, in the imposition of a sentence of more than six months are entitled to a speedy and prompt trial by an impartial jury in the first instance.

The Supreme Court of Virginia reached the opposite conclusion in *Manns v. Commonwealth*, 213 Va. 2nd 233 (1972)[27] holding that Mr. Justice White's footnote 30 in *Duncan* "makes it clear" that the question of "incorporation" was an "open" one. See also to the same effect, *Walker v. Dillard*, 363 F. Supp. 921 (W.D.V. - 1973) which, like *Manns*, relied on Mr. Justice Fortas' concurring opinion to *Duncan*. Since these opinions are contrary to this Court's holding in *Duncan*, appellant alleges that they are inapposite.

In *Whitmarsh v. Commonwealth*,___Mass.__, 316 N.E. 2d 610, 618-619, the Supreme Judicial Court held that the "state of the law on the subject is highly uncertain" and therefore it was not "required to conclude either (a) that the Sixth Amendment *would be* interpreted at the present time by the Supreme Court to require a trial by jury in the first instance . . . , or (b) that *even if* that court did reaffirm this rule . . . with respect to the Federal Courts, it *would* apply such a requirement in equal fashion to the states." Appellant submits that it was the duty of the Supreme Judicial Court under Article VI of the Constitution to interpret the decisions of this Court as they existed and apply them. Instead, the Supreme

[27]Cf. *Manns v. Koontz*, 451 F.2d 1345, (4th Cir. 1971)

Judicial Court evaded the issue on the grounds that "the meaning of the Sixth Amendment's jury trial provision and perhaps also specific instances of its application to the States . . . continues to be in flux." In any event, the decision should be accorded no value.

Lastly, on this branch of the argument, applicant maintains that *Williams v. Florida*, 399 U.S. 78 (1970) and *Apodaca v. Oregon*, 406 U.S. 404 (1972) are not contrary to his position that *Duncan* bound the States to the rule of *Callan v. Wilson*. In *Williams*, this Court held that the States are not required to afford a defendant a twelve-man jury as the meaning of the Sixth Amendment did not include a twelve-man jury requirement. In reaching this conclusion, the Court in effect overruled the federal twelve-man requirement and hence this decision is entirely consistent with Mr. Justice White's remark in n. 30 in *Duncan*:–"[o]ur decisions interpreting the Sixth Amendment are always subject to reconsideration. . . ." Quite apart from this consideration, *Duncan* was expressly reaffirmed by the Court at p. 86, and by Mr. Justice Black concurring at p. 107:

> We have emphatically "rejected the notion that the Fourteenth Amendment applies to the States only a 'watered down, subjective version of the individual guarantees of the Bill of Rights.'" *Malloy v. Hogan*, 378 U.S. 1, 10-11. Today's decision is in no way attributable to any desire to dilute the Sixth Amendment in order more easily to apply it to the States, but follows solely as a necessary consequence of our duty to reexamine prior decisions to reach the correct constitutional meaning in each case. The broad implications in early cases indicating that only a body of 12

members could satisfy the Sixth Amendment requirement arose in situation where the issue was not squarely presented and were based, in my opinion, on an improper interpretation of that amendment. Had the question presented here arisen in a federal court before our decision in *Duncan v. Louisiana*, 391 U.S. 145, (1968), this Court would still, in my view, have reached the result announced today.

In *Apodaca v. Oregon*, 406 U.S. 404, this Court held that the unanimous jury requirement of the Sixth Amendment was not applicable to the States. In so holding, four justices impliedly overruled the requirement as to federal trials and as such their plurality opinion is consistent with *Duncan*. Mr. Justice Powell reached the same conclusion, but was not in "accord with a major premise upon which that judgment" was based, namely "that the concept of jury trial as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment," *Apodaca, supra*, 369. Three justices in dissent felt that the federal standard should not be changed and hence, the states should be bound to the unanimous jury requirement on the basis of *Duncan*. Accordingly, appellant submits that this decision is not a departure from *Duncan* in principle. It simply redefined "what is meant by the concept 'jury' " in the context of the Sixth Amendment.

IV

THE INTERPOSITION OF A TRIAL BY MAGISTRATE PRIOR TO AFFORDING A DEFENDANT A JURY TRIAL IS AN UNCONSTITUTIONAL BURDEN ON THE RIGHT TO TRIAL BY JURY.

As Justice Harlan calls to our attention in *Baldwin v. New York*, 399 U.S. 66, 137, the bedrock of *Callan v. Wilson* is that the accused should not be put to "the burden of two trials if he wishes a jury verdict." That "burden" was eloquently set out by Mr. Justice Thomas of the Supreme Judicial Court in his memorable dissent in *Jones v. Robbins*, 8 Gray 329, 351-2:

> It seems to me plain that, when the Constitution declares that "the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury," its meaning is trial by jury when and wheresoever he shall be tried; not upon his second trial, nor after having been subjected to another and different mode of trial. If, for an offense subjecting him to capital or infamous punishment, the citizen may be tried once without a jury, it is not easy to see why he may not be so tried a second time; why the legislature may not provide that, upon appeal to the municipal court, he may be tried by a single judge, and postpone his trial by jury to his appeal to this court. Such a law would, indeed clog and obstruct his trial by jury; but the difference between that and this is in degree only.
>
> The subjecting the accused to one trial by a single magistrate obstructs the right of a trial by jury,

and essentially impairs its value. It places between the accused and a trial by jury a barrier not necessary for the security of the public, such as are the preliminary examination and the holding to bail. It interposes unnecessary delay between the accusation and trial by his peers. It subjects him to unnecessary and often fatally burdensome expense before he can reach the tribunal by which it is his right and his security to be tried. The subject cannot be said, under such a law, to obtain his right "freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay".

When you state the proposition that a man may be constitutionally tried for murder by a justice of the peace or a police court, or by any single judge, even after indictment, and that he cannot have a trial by jury until he has been tried by a single magistrate, I think every mind familiar with the Constitution, and with the common law rights secured by it, shrinks from the conclusion; yet it is to be observed, that the twelfth article of the Bill of Rights makes no distinction between laws subjecting the citizen to capital and those subjecting him to infamous punishments. They stand on the same ground.

I am aware that in some text-writers of authority, and in the dicta of judges for whom I feel the highest respect it has been said, that if there is an unobstructed and unclogged right of appeal to a court in which a trial by jury can be obtained, the article of the Bill of Rights is satisfied. To this view I answer . . . [t]hat is not an unobstructed and unclogged right of appeal, which the twelfth article secures, but an unobstructed and unclogged right of trial by jury.[28]

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[28]"To these weighty words of Judge Thomas no satisfactory reply has ever been made."–*State v. Gerry*, 68 N.H. 495, 507 (1896).

Initially, it is observed that Justice Thomas recognized the possibility that if a "citizen may be tried once without a jury, it is not easy to see why he may not be so tried a second time". This same objection was raised by Justice Blatchford in *In re Dana*, 7 Benedict 14: (1876) "If Congress has the power to deprive the defendant of his right to a trial by jury, for one trial, . . . it is difficult to see why it may not also have the power to provide several trials by a court, without a jury, on several successive convictions, before allowing a trial by jury". Cf. *Williams v. Florida*, 399 U.S. 78, 91 n.28.

The "unnecessary and often fatally burdensome expense" referred to by Justice Thomas comprises the defendant's legal fees, witness fees, bail bond premium, and his loss of time and pay. For the accused who is innocent, but found guilty, he must bear these expenses for a meaningless proceeding before he ever gets into court where he may obtain a verdict by a jury. While it is true that Massachusetts assigns indigents free counsel,[29] *Argersinger v. Hamlin*, 407 U.S. 25 (1972), there are many defendants who are just above the indigent level and must hire private counsel for their defense in the lower Massachusetts courts. On the average, this expense is between $150-250. If the defendant "appeals" for a trial de novo he must pay further counsel fees of a minimum of $400. Cf. Massachusetts Bar Associations' Minimum Fee Schedule (1973). The expense of the lower court trial is often

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[29]Rule 3:10 of *Rules of the Supreme Judicial Court;* G.L. Ch. 221 Sec. 34D.

"fatally burdensome". For example, recently, this attorney witnessed a trial in a district court in which a school teacher was convicted for larceny of merchandise from a discount store. Upon conviction the defendant's lawyer informed him of his right to a jury trial. The defendant asserted his innocence and indicated he wanted to "appeal". His counsel then informed him that the cost for his services on "appeal" for arraignment and trial would be $450. The defendant replied "Well I already have lost two days pay and $250 and if we appeal it will cost me another two days pay and $450 more. I cannot afford that. We better take the best deal we can get here."[30]

In and above the financial burden, appellant maintains that the district court trial has a limiting effect on the right to trial by jury. Some of the more discouraging aspects of the proceeding are recorded by Bing and Rosenfeld in *The Quality of Justice* at p. 105-106:

> Arguments on motions when they are brought, pit the judge and defense counsel as adversaries. The police prosecutor, unfamiliar with controlling court decisions, participates only to comment upon the facts. The burden falls upon the judge first to develop the arguments in opposition to the defense motion, and then decide who has made the better argument.
>
> When defense counsel make motions to suppress illegally obtained evidence, district court judges

[30]"We have concluded on the basis of hard statistical data that in determining guilt or innocence, a man's finances are more important than the circumstances surrounding the charge, and ultimately, money determines the final disposition," Bing and Rosenfeld, *The Quality of Justice,* p. ix. See also Hasler, *De Novo Jury Trials,* 23 Maine Law Rev. 63, p. 82-83, (1971).

> frequently reserve decision until the entire case has been heard. If he thinks the defendant is guilty–influenced in part by the questionable evidence–rather than weighing the motion exclusively on its merits, he is in a position to balance the legal merits of the motion against the seriousness of the crime.
>
> The trials themselves are brief. One judge's impatience with zealous defenses was expressed when he remarked to a defense counsel, "We don't follow those Supreme Court decisions here."
>
> The formal requirement for a guilty finding is proof beyond a reasonable doubt. In district court trials, there are strong indications that the government's burden is reduced to showing that the preponderance of the evidence establishes the defendant's guilt. . . .
>
> At the heart of the district court's attitude, which overlooks rules of law and guaranteed rights, is the belief that the defendant can always protect himself by asserting his right to trial de novo.[31]

No doubt can exist that the net effect of such a trial is to discourage the accused, if he is found guilty, from proceeding further.

Quite apart from the trial itself, the sentencing procedure is often a fatal deterrent on the exercise of the accused's right to trial by jury. For example, in the instant case, after finding Steven Costarelli guilty, the

[31]The most graphic illustration that the burden of proof is reduced to the preponderance of the evidence test is a case reported by Bing and Rosenfeld, *The Quality of Justice,* at p. 83. In this decision, the trial judge resolved the conflicting testimony of the defendant and police officers by holding: "Well I don't know who to believe. Just to play safe I will find you guilty."

trial judge in the Municipal Court announced that he would impose a one year suspended jail sentence if the defendant would forgo his "right of appeal" for a trial by jury, or otherwise he would impose a one year sentence. When this attorney objected to the choice the trial judge addressed Steven Costarelli: "Take your pick, one year suspended with no appeal, or one year with appeal".[32] Steven Costarelli exercised his right in accordance with this counsel's strong advice and over his own judgment. The trial judge then imposed the one year sentence (App.-5).[33] This type of sentence conditioning is not the result of personal vindictiveness,[34] Cf. *Blackledge v. Perry*, 417 U.S. 21, (1974), but rather it is the product of the institutional interest of the district court judge in discouraging what he considers frivolous "appeals". For another paradigm see *Grayson v. Montgomery*, 421 F.2d 1306 (1st Cir. 1970).

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[32]See *Quality of Justice* at p. 86-88 for more "detailed" description of this procedure.

[33]Regarding this alleged impropriety, Steven Costarelli has petitioned the Supreme Judicial Court for extraordinary relief, *Costarelli v. DeGuglielmo*, No. 034.

[34]Bing & Rosenfeld, *The Quality of Justice*, at p. 86-88; *Chaffin v. Stynchone* 412 U.S. 17 (1973).

In addition to the deterrent sentencing procedures in the district court, the defendant faces the threat of a harsher sentence being imposed if he is reconvicted in the superior court. More specifically in *Mann v. Commonwealth*, ____ Mass. ____,271 N.E. 2nd 331, the Supreme Judicial Court held that a superior court judge may augment the district court sentence and that he does not have to affirmatively justify such action. See also *Lemieux v. Robbins*, 414 F.2d 353 (1st Cir. 1969), cert. denied, 397 U.S. 1017, (1970) holding the same. The decisions in both these cases rested upon *North Carolina v. Pearce*, 395 U.S. 711 (1969). However, the issue in *Pearce* was whether the threat of an increased penalty being imposed on retrial burdened the "right to appeal" in contradistinction to the right to trial by jury. These rights are entirely different. In the first case, the second trial results "at the defendant's behest". In the second case, the second trial results from the government's "behest" as it cannot imprison the accused unless it is pursuant to the judgment of his peers, and under these circumstances, the imposition of an increased penalty constitutes a penalty on the right to trial by jury:

> I find it equally difficult to reconcile the increase of penalties, upon a conviction after an appeal, with the unimpaired enjoyment of the right of trial by jury. The act inflicts a fine of twenty dollars, if a conviction takes place before a justice of the peace. It must be that the legislature considered this the appropriate penalty for the offence. Certainly it cannot be said that the offence is aggravated, by the accused having

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[36]G.L. Ch. 218 Sec. 26 (Br. App.-54).

> claimed a trial by jury. For what, then, is the additional penalty of eighty dollars, or the additional imprisonment for thirty days, inflicted? If the offence remains the same, and the offender has done nothing but claim an appeal, in order to have his case tried by a jury, must not these additional penalties be founded on the exercise of that right?
>
> *Greene v. Briggs*, 10 F. Cas. 1135, 1141, (No. 5,764) (C.C.R.I. 1852).

This distinction was raised in *Whitmarsh v. Commonwealth*, Mass., 316 N.E. 2nd 610, 619-620, but the Supreme Judicial Court rejected it on the authority of *Colten v. Kentucky*, 407 U.S. 104 (1972). In *Colten*, this Court sustained an augmented sentence imposed after a trial de novo in the second tier of Kentucky's two-tier procedure. But this holding is not controlling because the two-tier procedure in Kentucky is fundamentally different than the Massachusetts procedure. In the Kentucky procedure, the accused is afforded a jury trial in the first tier. Colten expressly waived this right.[35] Accordingly, his trial de novo in the second tier of the Kentucky procedure was at his "behest" and as such was equivalent to retrial subsequent to "appeal" as was the case in *Pearce*.

Quite apart from this consideration, this Court took pains to note that in the Kentucky procedure, "the record from the lower court is not before the superior court and is irrelevant to its proceedings", and "[i]n all likelihood, the trial de novo court is not even informed of the sentence imposed in the inferior court and can

[35] "Although appellant here was entitled to a six-man jury, . . . which he waived . . ." *Colten*, at p. 113. Additionally, it should be observed that Colten was not even entitled to a jury trial at any time as the maximum penalty under the statute upon which he was charged did not exceed six months imprisonment.

hardly be said to have 'enhanced' the sentence." As such, this Court refused to impose the prophylactic rule of *Pearce*. In Massachusetts, however, the record of the lower court proceedings, including the sentence imposed, is transmitted to the superior court, G.L. Ch. 278 Sec. 20 (Br. App 4a).[36] As a matter of practice, the resentencing judge usually inquires initially as to why the district court sentence should not be reimposed. Such a procedure manifests the institutional weight of judicial comity between the two tiers in the Massachusetts system.

Additionally, in *Colten*, this Court observed at p. 119-120, that the defendant in the Kentucky procedure "can circumnavigate the inferior court simply by pleading guilty and erasing immediately thereafter any consequence which would otherwise follow from tendering the plea."[37] There is no similar procedure in Massachusetts. If the accused pleads guilty, his plea is considered a waiver of his right to a jury trial, *Commonwealth v. Crapo*, 212 Mass. 209-210. The defendant must stand trial in a proceeding that denies him his Sixth Amendment right. Accordingly, it is submitted that *Colten* does not control.

Appellant submits that the above noted burdens, namely the additional legal fees, witness fees, bail

[36] The de novo jury is also aware that the accused has been previously adjudged guilty. Compare *Chaffin v. Stynchcombe*, 412 U.S. 17, 28, n.13-14.

[37] Cf. *Lemieux v. Robbins*, 414 F. 2nd 353, 356 (1st Cir. 1969), cert. denied 397 U.S. 1017: "[W]e hold the defendant has no constitutional right to complain of a "chilling effect" when in effect, he need not stand in the draft in the first instance."

premium, loss of pay, and the threat of increased penalties in the superior court are a deterrent on the exercise of the accused's right to trial by jury. In a given case, any one of the above factors may tip the scales against the accused in exercising his right to trial by jury. Additionally, and perhaps most important, there is the deterrent effect of the trial, conviction, and sentence. When viewed in toto, the conclusion is inescapable that the interposition of a trial by magistrate deters the exercise of the right to trial by jury, and as such, constitutes an unconstitutional burden on the right, *United States v. Jackson*, 390 U.S. 570, 582, 583 (1967): "A procedure need not be inherently coercive in order that it be held to impose an impermissable burden;" for "if the provision had no other . . . effect than to chill the assertion of constitutional rights by penalizing those who chose to exercise them, then it would be patently unconstitutional."[38]

Two arguments have been set forth to establish that the imposition of a trial by magistrate is not an unconstitutional burden on the right to trial by jury. The first is set forth by Mr. Justice Shaw in *Jones v. Robbins*, 8 Gray 329, 341 namely, that the only burden placed on the accused in the two-tier process is the delay and recognizance which "are the same and no greater than they would be in case the magistrate, instead of passing sentence should, on examination, bind the accused over, or, as the necessary alternative,

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[38] See also *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969), Stewart concurring.

commit him to jail". This theory is fully rebutted by Chief Justice Carpenter in *State v. Gerry*, 68 N.H. 495, 505-6 (1896):

> To say that the required recognizance upon an appeal subjects the party to no greater inconvenience,—is no greater burden than the recognizance required upon an examination and binding over,—if it were true, does not conclude the matter. It is not merely the recognizance but the judgment of the magistrate, the sentence without a jury trial, that burdens. But it is not true. In legal effect, the difference between recognizances upon a binding over and upon an appeal is great. In the first case, the sole consequence of a default or forfeiture is to create a debt in the amount of the recognizance, payment of which may be enforced. Upon the forfeiture of the recognizance taken on appeal not only is the defendant subjected to the payment of the amount of the recognizance, but he is also, under the Massachusetts statute, sentenced by the court appealed to as if he had been convicted in that court. By his default he is held to waive a jury trial. *Commonwealth v. Whitney*, 108 Mass. 5, 6, 7.

The Massachusetts statute referred to above was the predecessor to G.L. Ch. 278 Sec. 24, (Br. App. 1a), which requires that upon the failure of the defendant to prosecute his "appeal", "he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted in." This statute in effect shifts the burden to the accused, a patently unconstitutional procedure:

> A fatal objection to this doctrine is that it puts the burden of obtaining a jury trial upon the defendant, instead of the state. It compels him to

appear and demand the trial, without which the constitution expressly declares he shall not be condemned. The difference between a right to jury trial upon demand made therefor and the right not to be convicted or punished until a trial is had, is wide. A man is not to be imprisoned or otherwise punished because a corrupt or ignorant magistrate has found him guilty of crime, . . . As long as he remains entirely passive,–as long as he neither does nor says anything relative to the charge against him, except to maintain his innocence by a plea of not guilty,–he is assured by the express terms of the constitution that he cannot be punished until the state has obtained a verdict of guilty from twelve of his neighbors. "No subject shall be deprived of life, liberty, or estate but by the judgment of his peers." This language does not mean–it cannot reasonably be construed to mean–that he may be tried and finally condemned by a magistrate unless he takes certain prescribed measures to procure a constitutional trial. *State v. Gerry,* supra, p. 506.

The second contention is that trial de novo is to the defendant's advantage in that he "gives up nothing by going to trial in the district court," *Lemieux v. Robbins,* supra, at p. 355, while at the same time "he actually gains the distinct advantage of a preview of the prosecution's case without having to disclose his own", *Mann v. Commonwealth,*___Mass.___271 N.E.2d 331, 334.[39] When viewed in light of some of the collateral consequences that attach to the accused upon conviction in the district court, e.g. loss of one's driver's license, this argument flies in the face of reality. Quite

[39] "Thus, in effect, . . . the defendant has 'two bites at the cherry'," *Mann v. Commonwealth,*__Mass._, 271 N.E.2d 331, 332.

apart from this, the defendant cannot help but expose his defense through cross examination of the government's witness.[40] Likewise, cross examination has the tendency of hardening and polishing the government's witnesses in the de novo trial in the superior court. See e.g. *Ashe v. Swenson*, 397 U.S. 436, 439-440 (1970); and *Carsey v. United States*, 392 F.2d 810, 813-814 (D.C. cir. 1967) which detail the metamorphasis of testimony in the first and subsequent trials. Alternatively, if defense counsel does not cross examine the government's witnesses in the district court, and if they subsequently become unavailable, their unimpeached testimony will be admitted against the accused since the opportunity to cross examine the witnesses existed in the district court. *Commonwealth v. Mustone,* 353 Mass. 490 1968) distinguishing *Pointer v. Texas,* 380 U.S. 400 (1965).

Lastly, on this section of the argument, it should be observed that in addition to being a burden on the right, the imposition of a trial by magistrate manifestly runs counter to the "purpose" and "function" of the right to trial by jury:

> As we said in *Duncan*, the purpose of trial by jury is to prevent oppressions by the Government by providing a 'safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' . . . Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of

[40] Cf. *Myers v. Commonwealth,* ____ Mass. ____, 298 N.E.2d 819, 828 (1973).

laymen. . . ." *Williams v. Florida*, supra, at 100. *Apodaca v. Oregon*, 406 U.S. 404, 410 (1972).[41]

Accordingly, appellant submits that the rule of *Callan v. Wilson* is not just a "detail" in the definition of what is meant by a jury, but rather it is an essential element of the right, and for this reason, it should be left undisturbed.

V.

THERE IS NO COMPELLING INTEREST ON THE PART OF MASSACHUSETTS TO JUSTIFY ITS INFRINGEMENT OF THE RIGHT TO TRIAL BY JURY.

When Steven Costarelli was placed in jeopardy before the Municipal Court of Boston, it was his right to obtain a jury verdict, *Duncan v. Louisiana*, 391 U.S. 145. Massachusetts had no more right to deny him this *fundamental right* than the right to confront witnesses against him, or the right to counsel of his own

[41] De novo jury trials for serious offenses were not existent at common law or in America in 1784. De novo bench trials were in existence in England for petty offenses, Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial By Jury*, 39 Harv. L. Rev. 917, 932-36 & n.85 (1926). In New Hampshire a de novo jury was afforded the accused in case of misdemeanors. "In all other cases trial by jury was free. The accused was not obliged to purchase, or even to demand, it. . . . The burden rested not upon him to procure either a trial or an acquittal. It rested on the state—to obtain a trial by jury, as well as a conviction by their verdict." *State v. Gerry*, 68 N.H. 495, 499-500 (1896).

choosing, or the right to remain silent. The abridgment of this right by the trial judge of the Municipal Court was a denial of the right, and it is no answer on the part of Massachusetts to say that it offered the defendant a trial de novo with the full panolpy of Sixth Amendment procedural rights. This argument was rejected in *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62, wherein the accused was initially denied an impartial tribunal:

> Respondent also argues that any unfairness at the trial level can be corrected on appeal and trial de novo in the County Court of Common Pleas. We disagree. This "procedural safeguard" does not guarantee a fair trial in the mayor's court; . . . Nor in any event may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

But even if it assumed, arguendo, that the interposition of a trial by magistrate is an incidental burden on the right to trial by jury, appellant maintains that there is no "compelling state interest" to justify the infringement on the *fundamental right* to trial by jury, *Roe v. Wade*, 410 U.S. 113, 155; *Shapiro v. Thompson*, 394 U.S. 618, 631-634 (1969); *Sherbert v. Verner*, 374 U.S. 398 403-406 (1963). Massachusetts, of course, has an interest in allocating its judicial resources by maintaining a two-tier structure.[42] but this interest can

[42] *Lemieux v. Robbins*, 414 F.2d 353, 355 (1st cir. 1969), cert. denied, 397 U.S. 1017; Hasler, *De Novo Jury Trials*, 23 Maine Law Rev. 63 (1971). But see Mr. Justice Black's retort in *Green v. U.S.*, 356 U.S. 165, 216 (1958): "It is undoubtedly true that a judge can dispose of charges . . . faster and cheaper than a jury.

be achieved equally as well, if not more efficiently, by allowing the accused the option of proceeding initially in the first tier or obtaining a jury trial in the first instance in the second tier. See *Holliday v. State*, 109 R.I. 93 (1971); and *Baldwin v. New York*, 399 U.S. 66, 74, n.22 (1969). Indeed the allowing of the accused this option would more than likely effect a saving of Massachusetts judicial resources.[43]

But such trifling economies as may result have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap easy convictions were not the primary concern of those who adopted the Constitution and Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy."

[43]There are certain types of cases in which a defendant, if given an option, will always choose a trial by jury in the first instance, or if not given the option, will always "appeal" for a trial de novo. This is particularly true in driving under the influence of intoxicating liquors cases where conviction results in the loss of one's driver's license for a minimum of one year and where the reversal rate of district court convictions by juries is extremely high. See Boston Herald American, Feb. 24, 1973, which reported that in one session of Suffolk Superior Court "19 out of 22 defendants who appealed lower court findings of guilty imposed by judges were subsequently acquitted by juries of their peers!"

VI.

THE FORCED INTERPOSITION OF A TRIAL BY MAGISTRATE PRIOR TO AFFORDING THE ACCUSED A TRIAL BY JURY IS AN UNCONSTITUTIONAL IMPOSITION ON THE RIGHT TO A SPEEDY TRIAL.

Referring again to Justice Thomas' dissent in *Jones v. Robbins*, supra, it is observed that he objected to the "unnecessary delay between accusation and trial by . . . [the defendant's] peers", on the grounds that a defendant ought to obtain his right to a trial by jury " 'freely, and without delay' ". The latter words come from Article XI of the Massachusetts Constitution which reads:

> Every subject of the Commonwealth ought to find a certain remedy by having recourse to the laws, for all injuries or wrongs he may receive in his person, property, or character. He ought to obtain right and justice freely and without being obliged to purchase it; completely and without denial, promptly and without delay; comformably to the law.

Article XI is in essence the underpinning to the speedy trial guarantee of the Sixth Amendment which this Court made applicable to the states in *Klopfer v. North Carolina*, 386 U.S. 213, 222-3, 225-6 n.21 (1966):

> We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment.

Initially, appellant maintains that it is unnecessary to decide whether the total time elapsed between arrest,

trial in the district court, and trial de novo in the superior court is impermissable per se in light of the Sixth Amendment standards, Cf. *United States* ex rel. *Frizer v. McMann*, 437 F.2d 1312, (2nd cir. 1971); *United States v. Butler*, 426 F.2d 1275 (1st cir. 1970). However, some passing observations are helpful. First, the time schedule in the superior court for trial of misdemeanors and less serious felonies is deplorable. Chief Justice Tauro of the ~~Superior~~ Supreme Judicial Court summarized the judicial log-jam succinctly in his 1972 State of the Judiciary address, 57 M.L.Q. 209, 2, 3: "The dismal plight of the superior court cannot in any sense support even guarded optimism." See also *Ad Hoc Committee on Judicial Administration v. Commonwealth of Massachusetts*, 488 F.2d 1271, (1st cir. 1973) cert. denied ____ U.S. ____ (1974). When one considers the added delay of a trial in the district court, the intervening time between "appeal" and docketing in the superior court, it is observed that the total time between arrest and trial by jury may be between six months and a year and a half.[44] No doubt exists that this time period, in itself, would violate the speedy trial provisions applied in many jurisdictions. See e.g. Rule 4 of the Second Circuit Court of Appeals: "In all cases the government must be ready for trial within six months from the date of arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried."; and ABA, *Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial* (1968).

[44] In Suffolk County, the misdemeanor session sits continuously in the superior court and the time delay in "appeal" is short.

Although Massachusetts' court congestion is entitled to some weight in excusing delay, this Court has stated in *Barker v. Wingo*, 407 U.S. 514 (1972) that "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant". In a concurring opinion Justice White emphasized this point more strongly at p. 537-538:

> A defendant desiring a speedy trial, therefore, should have it within some reasonable time; and, only special circumstances presenting a more pressing public need with respect to the case itself should suffice to justify delay. Only if such special considerations are in the case and if they outweigh the inevitable personal prejudice resulting from delay would it be necessary to consider whether there has been or would be prejudice to the defense at trial. "[T]he evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense."

In light of this criteria, it is submitted that the "unnecessary delay" noted by Justice Thomas is not a factor entitled to some weight in justifying Massachusetts' delay in bringing a defendant to trial. Indeed, in light of the expense and burden a defendant must suffer by a district court trial, the "unnecessary delay" is more akin to a "deliberate attempt to delay the trial in order to hamper the defense" and "should be weighed heavily against the government", *Barker v. Wingo*, supra, p. 531. Implicit in the right to a speedy trial is the right to a speedy trial by jury, and the interposition of a trial without a jury is an unnecessary burden on the right.

Quite apart from these considerations, the more serious charge against the trial de novo system is that it is totally counterproductive in minimizing the "anxiety and concern of the accused", *Barker v. Wingo*, supra, p. 532 one of the main purposes of the speedy trial guarantee. This object is set out more fully by this Court in *United States v. Marion*, 404 U.S. 307, 321 (1971):

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. These considerations were substantial underpinnings for the decision in *Klopfer v. North Carolina*, supra.

The same reasoning is also applicable to the defendant who is not arrested: "Finally even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility", *Barker v. Wingo*, supra, p. 533.

For the defendant who simply listens to the government's case, and wishes not to disclose his defence, a trial in the district court is a meaningless proceeding which may "drain his financial resources". The finding of guilty and "appeal" do not minimize anxiety but amplify it; and the ordinary inference drawn from "appealing" generates a "cloud of suspicion". In short, the two-tier de novo procedure cuts away the right to a speedy trial at its roots. See *State v. Holliday*, 109 R.I. 93, 103:–"The Constitutional right to a speedy trial by a jury contemplates that the accused

shall be entitled to a trial by a jury at the time he is initially subjected to judicial process which could subject him to a loss of liberty by imprisonment in excess of a period of six months."

VII.

MASSACHUSETTS' TWO-TIER TRIAL DE NOVO PROCEDURE VIOLATES THE DOUBLE JEOPARDY PROVISIONS OF THE FIFTH AMENDMENT.

In *Benton v. Maryland*, 395 U.S. 784, 794, (1969), this Court bound the states to the double jeopardy provisions of the Fifth Amendment by incorporating them in the Fourteenth Amendment. The underpinnings of these provisions are set out by Justice Harlan in *United States v. Jorn*, 400 U.S. 470, 479 (1971):

> A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. Both those considerations are expressed in Green v. United States, 355 U.S. 184, 187-188 (1957), where the Court noted that the policy underlying this provision "is that the State with all its resources and power should not be allowed to make repeated attempts to convict an

> individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Appellant alleges that Massachusetts' trial de novo procedure, if tested in the light of these criteria, cannot sustain constitutional validity.

The two-tier procedure inherently subjects a defendant twice to the heavy "personal strain which a criminal trial represents". A conviction in the district court subjects him in the eyes of the community to the "embarrassment" of being "found guilty" and "appealing" in a criminal proceeding. Similarly, conviction in the district court "burdens the defendant with a meaningless expense and ordeal and compells him "to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty". In short, such a procedure is not consonant with limiting "the Government to a single criminal proceeding to vindicate its vital interest in enforcement of criminal laws". Implicit in limiting the government to one crack at the defendant is limiting it to a proceeding which comports with Sixth Amendment standards.

Similarly, appellant maintains that the prohibitions of double jeopardy clause not only bar punishing a defendant twice for the same crime, but bar placing him to his defense a second time, *Ex Parte Lange* 18 Wall 163, 169 (1893). While it is true that retrial is not barred by double jeopardy principles in the case of the defendant who perfects a successful appeal, *United States v. Ball,* 163 U.S. 662 (1896), it is equally true

that the bar to reprosecution is not "confined to prevention of prosecutorial or judicial overreaching" *United States v. Jorn,* supra, 484, but extends to designed governmental procedures that place a defendant to his defense a second time to obtain that which he is entitled to in the first instance.

More specifically, the double jeopardy clause bars reprosecution when absent a "manifest necessity", the accused is deprived of "his valued right to have his trial completed by a particular tribunal," *Wade v. Hunter*, 336 U.S. 684, 688 (1949); *United States v. Jorn*, supra, 484. In *Jorn*, this Court held reprosecution was barred after a mistrial was declared by the trial judge, sua sponte, since the defendant was denied his option to go to the jury once he was placed in jeopardy. Similarly, in the instant case, once Steven Costarelli was placed in jeopardy, he was entitled to the judgment of his peers and the denial of his motion for a jury trial was equivalent to the trial judge's declaration of a mistrial in *Jorn*. In both cases, the defendant was deprived on his jury verdict once he was put to trial.

CONCLUSION

Appellant submits (1) that his conviction in the Municipal Court of Boston was unconstitutional since he was denied his Sixth Amendment right to a trial by jury; (2) that reprosecution is barred since his Sixth Amendment right to a speedy trial was abridged; and (3) that reprosecution is barred by the double jeopardy provisions of the Fifth Amendment.

WHEREFORE, appellant prays that this Court reverse his conviction and remand this case to the Municipal Court of the City of Boston with instructions that the complaint upon which he was charged should be dismissed with prejudice.

Respectfully submitted,

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APPENDIX

Article XII of the Massachusetts Declaration of Rights:

> No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.
>
> And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment excepting for the government of the army and navy, without trial by jury.

G.L. Ch. 263 Sec. 4

> No person shall be held to answer in any court for an alleged crime, except upon an indictment by a grand jury or upon a complaint before a district court or in proceedings before a court-martial.

G.L. Ch. 278 Sec. 24

> If the appellant fails to enter and prosecute his appeal, he shall be defaulted on his recognizance and the superior court may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court, and, if he is not then in custody, may issue process to bring him into court to receive sentence.

G.L. Ch. 278 Sec. 2

Issues of fact joined upon an indictment or complaint shall, in the superior court, be tried by a jury drawn and returned in the manner provided for the trial of issues of fact in civil causes, unless the person indicted or complained against elects to be tried by the court as provided by law.

G.L. Ch. 263 Sec. 6

A person indicted for a crime shall not be convicted thereof except by confessing his guilt in open court, by admitting the truth of the charge against him by his plea or demurrer or by the verdict of a jury accepted and recorded by the court or, in any criminal case other than a capital case, by judgment of the court rendered as hereinafter provided. Any defendant in the superior court in a criminal case other than a capital case, whether begun by indictment or upon complaint or any defendant in the housing court of the city of Boston or in the housing court of the county of Hampden in a criminal case, may, if he shall so elect, when called upon to plead, or later and before a jury has been impanelled to try him upon such indictment or complaint, waive his right to trial by jury by signing a written waiver thereof and filing the same with the clerk of the court, whereupon he shall be tried by the court instead of by a jury, but not, however, unless all the defendants, if there are two or more charged with offenses growing out of the same single chain of circumstances or events whether prosecuted under the same or different indictments or complaints shall have exercised such election before a jury has been impanelled to try any of the defendants; and in every such case the court shall have jurisdiction to hear and try such cause and render judgment and sentence thereon.

Amended by St. 1971, c. 843, §21; St. 1973, c. 591, §20.

G.L. CH. 218 Sec. 26

District courts shall have original jurisdiction, concurrent with the superior court, of the following offenses committed within their respective district or otherwise made punishable therein: all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in sections sixteen, seventeen, eighteen, nineteen, twenty-eight and forty-nine of chapter two hundred and sixty-six, and the crimes of forgery of a promissory note, or of an order for money or other property, and of uttering as true such a forged note or order, knowing the same to be forged. They shall have jurisdiction of proceedings referred to them under the provisions of section four A of chapter two hundred and eleven. Amended by St.1958, c. 138; St.1962, c. 722, §8; St.1964, c. 140; St.1969, c. 496; St.1973, c. 585.

G.L. CH. 278 Sec. 18

Whoever is convicted of a crime before a district court may appeal the finding of guilty or the sentence imposed thereon to the superior court or may appeal to and claim a jury of six in a district court in accordance with section twenty-seven A of chapter two hundred and eighteen and at the time of conviction shall be notified of his right to take such appeal. The case shall be entered into the superior court on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred seventy-six,

until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at the superior court on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to time until the final sentence, order or decree, and not depart without leave, and in the meantime to keep the peace and be of good behavior. If the appellant is not released on personal recognizance and is committed for failure to recognize, the superior court shall thereupon have jurisdiction of the case for the purpose of revising the amount of bail required as aforesaid. The appellant shall not be required to advance any fees upon claiming his appeal or in prosecuting the same. Notwithstanding any other provision of law, a defendant, after a finding of guilty in a district court, may appeal therefrom and shall thereafter be entitled to a trial de novo in the superior court or may appeal to and claim a jury of six in a district court in accordance with said section twenty-seven A. Amended by St.1973, c. 657.

G.L. CH. 278 Sec. 20

Upon such appeal, the clerk of the district court shall transmit to the clerk of the superior court a copy of the complaint and of the record of conviction, the original recognizances, a list of the witnesses, the appearance of the attorney for the defendant, if any is entered, and a statement of the expenses; and no other papers need be transmitted.

G.L. Ch. 90 Sec. 24 (2) reads in part:

(a) . . . . and whoever uses a motor vehicle without authority knowing that such use is unauthorized shall, for the first offense be punished by a fine of not less than fifty dollars

nor more than five hundred dollars or by imprisonment for not less than thirty days nor more than two years, or both, and for a subsequent offense by imprisonment in the state prison for not more than five years or in a house of correction for not less than thirty days nor more than two and one half years, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment: . . . .

(b) A conviction of a violation of the preceding paragraph of this section shall be reported forthwith by the court or magistrate to the registrar, who may in any event, and shall unless the court or magistrate recommends otherwise, revoke immediately the license or right to operate of the person so convicted, and no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license or right to operate. If it appears by the records of the registrar that the person so convicted is the owner of a motor vehicle or has exclusive control of any motor vehicle as a manufacturer or dealer or otherwise, the registrar may revoke the certificate of registration of any or all motor vehicles so owned or exclusively controlled.

(c) The registrar, after having revoked the license or right to operate of any person under the preceding paragraph of this section, in his discretion may issue a new license or reinstate the right to operate to him, if the prosecution of such person in the superior court has terminated in favor of the defendant, or, after an investigation or upon hearing, may issue a new license or reinstate the right to operate to a person convicted in any court of the violation of any provision of paragraph (a) of subdivision (2) of this section; provided, that no new license or right to operate shall be issued by the registrar to . . . any person

convicted of violating any other provision of paragraph (a) of subdivision (2) of this section until sixty days after the date of his original conviction if for a first offense, or one year after the date of any subsequent conviction within a period of three years.